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No. 97-1764

In The

Supreme Court of the United States

October Term, 1997

RACHEL BAUCHMAN,

Petitioner,

vs.

WEST HIGH SCHOOL, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT RICHARD TORGERSON

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QUESTIONS PRESENTED

1. Whether a student's Establishment Clause claim of religious purpose against her school teacher may be premised upon alleged conduct involving nonparties during earlier periods of time even though the complaining student has not herself been subjected to any endorsement of religion.

2. Whether, having correctly stated and followed the standards pertaining to motions to dismiss and for leave to amend pleadings, the Tenth Circuit properly affirmed the district court's orders dismissing petitioner's original complaint and denying leave to amend.

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STATEMENT OF THE CASE

From the outset of this action, petitioner Rachel Bauchman ("Bauchman") has contended that a public school choir may not perform songs with religious lyrics and may not sing in venues owned by churches. Citing analogous Fifth and Eighth Circuit rulings, the Tenth Circuit and, before it, the district court exhaustively reviewed and rejected Bauchman's claims. There is unanimity among federal courts on this point. No court — not even Judge Murphy's dissent in this case — has adopted Bauchman's strained reading of the Establishment Clause as it pertains to public school music curricula and performance venues.

After losing her principal claim in the district court, Bauchman belatedly switched legal theories and sought to amend her complaint. Specifically, Bauchman sought refuge in the *Lemon* test's purpose prong by attacking the entirety of choir director Richard Torgerson's ("Torgerson's") twenty year teaching career, spanning a period before Bauchman was born. This, even though Bauchman participated in the a'cappella choir (the "Choir") at West High School for only one year — the 1994-95 school year. She did not attend West High prior to 1994-95, has not attended since, and has long since graduated from high school. She nevertheless merges allegations regarding prior years with events of the 1994-95 school year in hopes that dredging up the past will breathe life into otherwise futile allegations regarding *her year* in the Choir. Bauchman begrudgingly admitted in discovery that, during her year in the Choir, Torgerson:

- Never had the Choir perform during a religious service;
- Never prayed with the Choir;
- Never talked to the Choir about religious doctrines or beliefs;

- Never criticized the beliefs of any religion, atheism, or agnosticism;

- Never told the Choir he was a Mormon; and

- Never suggested that Choir members convert to Mormonism, Christianity, or any other religion.

Given Bauchman's admissions, the Tenth Circuit looked beyond Bauchman's conclusory allegations to well-pled facts and the evidence Bauchman invited the court to consider. The Tenth Circuit construed the pleadings in the light most favorable to Bauchman, and concluded that she had not pled an Establishment Clause violation. The Tenth Circuit correctly rejected Bauchman's attempt to convert allegations about prior years into a purpose prong violation. After all, the Tenth Circuit reasoned, nothing in this Court's purpose prong analysis "condone[s] the use of alleged past violations suffered by nonparties to bootstrap the constitutional claims of a present litigant." *Bauchman v. West High School*, 132 F.3d 542, 560 (10th Cir. 1997).

A. The Original Complaint

Bauchman, then a sophomore member of the Choir, filed this action on May 31, 1995. TCA 1.[1] In her Complaint, Bauchman asserted an Establishment Clause claim that differs from the one she now puts forward. Originally, Bauchman alleged a violation merely because the Choir's musical repertoire contained some songs with religious lyrics that she characterized as "Christian devotional music" and because the Choir performed at "religious sites." TCA 4-6. Bauchman did not, because she could not, allege that the Choir had performed at any religious service during 1994-95. *Id.*

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1. "TCA" refers to Bauchman's Appendix in appeal No. 96-4101 before the United States Court of Appeals for the Tenth Circuit. "TorApp" refers to Torgerson's Supplemental Appendix in that appeal.

Torgerson and the other school district defendants moved to dismiss Bauchman's Complaint. On September 13, 1995, the district court granted these motions to dismiss, assuming Bauchman's allegations to be true but finding that "singing of songs [with religious lyrics] is not an 'explicit religious exercise' " and that "[m]usic has a purpose in education beyond the mere words or notes in conveying a feeling or mood, teaching culture and history, and broadening understanding of art." *Bauchman v. West High School*, 900 F. Supp. 254, 268 (D. Utah 1995).

B. The Amended Complaint — Bauchman Shifts Theories

Following the dismissal of her Complaint, Bauchman filed a motion for reconsideration or, in the alternative, to amend the district court's order to allow leave to file an amended complaint. In an Order dated November 22, 1995, the district court denied Bauchman's motion for reconsideration. TCA 272-77. Regarding the proposed Amended Complaint, the district court noted that Bauchman had "essentially restate[d] the original grievance," but that she had now alleged facts "dating back to 1977" and pled a single theory regarding the 1994-95 year that was "new and different from what was pleaded" in the original Complaint. TCA 269-71. Specifically, Bauchman alleged for the first time that Torgerson acted with an "improper religious purpose" to "promot[e] and endors[e] religious beliefs." TCA 269-71. Given this new theory, but with nothing more than Bauchman's conclusory allegations to support it,[2] the district court afforded Bauchman a discovery period so that the district court could "determine whether an amendment consistent with [Bauchman's] new theory should be allowed." TCA 276.

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2. As to the 1994-95 school year, the Amended Complaint alleges, in conclusory fashion, that the selection of songs and venues demonstrates that Torgerson's intent was religious. TCA 165-66 (Am. Compl. ¶¶ 17.a., 17.c.).

C. The Facts — As Alleged and As Developed Through Discovery

Pursuant to the district court's order, the parties conducted discovery regarding Bauchman's proposed Amended Complaint. Bauchman's petition badly mischaracterizes the evidence that resulted from that discovery. The facts are as follows:

1. Events That Pre-Date Bauchman's Year in the Choir

Bauchman rehearses a litany of allegations dating back to the 1970's, as if to suggest that events from years ago manifested themselves in the 1994-95 school year. Pet. 2-5. They did not, and Bauchman knows it. The parties did not conduct discovery regarding years prior to 1994-95, and Torgerson disputes much of what Bauchman alleges about earlier years. Even so, in both the district court and the Tenth Circuit, Torgerson acknowledged that, for purposes of the pending motions, Bauchman's far-flung allegations may be assumed as true. Torgerson also conceded that, in the 1970s, 80s, and early 90s, his choirs did what virtually every other high school choir in Utah was doing. They sang on occasion at religious services, including Catholic, Jewish, Baptist, Presbyterian, and LDS services. TCA 581.

Critically, however, the Choir has *not* sung in any religious service since the spring of 1994. That spring, before Bauchman ever enrolled at West High, Torgerson wrote a letter to Choir students' parents in which he responded to some parents' complaints. Torgerson "apologize[d] . . . for any discomfort that [he] caused" and indicated he was "grateful to know that [he] need[s] to be much more sensitive to students' needs." TCA 583, 585. Torgerson declared that he "would never again as an agent of the school offer a prayer in [students'] presence or involve them in a worship service of any kind. I fully intend to keep my word." TCA 582-83. These events pre-date Bauchman's

involvement in the Choir, and, as the facts in 1994-95 demonstrate, Torgerson honored his commitment.

2. Events of 1994-95 — Bauchman's Year in the Choir

The petition misrepresents the record regarding 1994-95 — Bauchman's year in the Choir — suggesting inaccurately that allegations contained in Bauchman's Amended Complaint are "at virtually every point, supported by affidavit, documentary, or deposition evidence." Pet. 3 n.1. In truth, many of Bauchman's allegations were unquestionably disproved during discovery. Neither the district court nor the Tenth Circuit was fooled by Bauchman's sleight of hand.

Bauchman admits, for example, that during the 1994-95 school year Torgerson: (1) never had the Choir perform during a religious service; (2) never prayed with the Choir; (3) never talked to the Choir about religious doctrines or beliefs; (4) never criticized any religion, atheism, or agnosticism; and (5) never told the Choir he was a Mormon or suggested that Choir members become Mormons or Christians. TorApp 84-87, 97.

The Choir's repertoire and performance venues for the 1994-95 school year were similarly unremarkable. The Choir's repertoire consisted of a variety of music with both secular and religious lyrics.[3] While one of Bauchman's "experts" estimated that 63%

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3. The Choir's 1994-95 repertoire consisted of the following numbers: The Rhythm of Life, Consecrate the Place and Day, Jabberwocky, All My Trials, The Gondoliers, Let Me Fly, Ave Verum Corpus, The Eyes of All Wait Upon Thee, Ave Maria-Biebel, Nunc Dimittis, Be Thou My Vision, Beatles Medley, We Shall Not Be Moved, Bashana Haba'ah, You Are My Only One, The Last Rose of Summer, Mary Had a Baby, Ding Dong Merrily on High, Hallelujah Chorus from The Messiah, I Wanna Be Ready, O Come O Come Emmanuel, Angels We Have Heard On High, Silent Night, Good King Kong Looked Out, The Last Words of David, Hanerot Halalu, Friends, Due North — I (Mountains), (Cont'd)

of the Choir's songs "have a religious focus," TCA 334, the Fifth Circuit recently observed that "*60-75 percent* of serious choral music is based on sacred themes or text." *Doe v. Duncanville Ind. Sch. Dist.*, 70 F.3d 402, 407 (5th Cir. 1995) (emphasis added).

The Choir performed at 18 different sites during the 1994-95 school year, and only 5 of the 18 sites were affiliated with religious organizations.[4] Bauchman concedes that none of the performances was held during a religious worship service.[5] TorApp 97.

Bauchman also unfairly contends that Torgerson "criticized and ridiculed [her] in class lectures for her concerns." In fact, Torgerson

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(Cont'd)

Due North — III (Woodpecker), Medley from Big River, The Shepherds Had an Angel, I Dreamed a Dream, Advent Gift, The Lord Bless You and Keep You, Psalm 150, We Praise Thee, The Star Spangled Banner, Star of Bethlehem, and Love Changes Everything. TorApp 9-10.

4. Those locations are as follows: First Presbyterian Church, University of Utah — Gardner Hall, Assembly Hall at Temple Square, Joseph Smith Memorial Building, Ensign Elementary School, First Baptist Church, Abravanel Hall (twice), Salt Lake Community College, East High School, Rio Grande Depot Historical Museum, Northwest Intermediate School, Bryant Jr. High School, LDS Church Office Building, Salt Lake District Choral Festival, West High School, Woods Cross High School, Cyprus High School, and Olympus High School. TorApp 67-68.

5. Bauchman distorts the record here, as well. She suggests that Torgerson scheduled "many of the class performances in Mormon buildings and churches at which speakers endorsed the Mormon religion." She is referring to a single performance at the LDS Church Office Building, which Bauchman did not attend. Bauchman's friend, who did attend, indicated only that a woman "who worked in the church office building" introduced the Choir and talked about "religion." TorApp 116A, 116I-116J. At this performance, "there were no prayers offered," there was no religious service, and Torgerson said nothing to indicate support of the woman's remarks at the Church Office Building. TorApp 116B.

was responding to a series of demands and threats leveled against him by Bauchman and her parents.[6] Torgerson gave no "lecture" about which Bauchman complains until the Bauchmans attacked his teaching, TorApp 89, and then "went to the media" with the controversy they had created. TorApp 156-57. In any event, Bauchman's friend in the Choir recounted the benign content of Torgerson's lectures:

> Q. Can we fairly summarize the content of [Torgerson's] lectures by saying that he talked about his view of his freedom of speech, his view of his academic freedom and his feelings about the controversy that had arisen in the school about the choir?
>
> A. Yes.
>
> Q. These lectures were not about religious doctrine, were they?
>
> A. No.
>
> Q. Mormon doctrine?
>
> A. No.

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6. In November 1994, Mr. Bauchman wrote to Torgerson, demanding that the Choir's repertoire completely exclude "contemporary religious music, and keep[] other religious music to a maximum of 10%." TCA 588. Regarding an upcoming Christmas Concert, Mr. Bauchman admonished Torgerson: "Put on a Winter Concert. Hold it in a mall, a school, or perhaps a hospital or nursing home." *Id.* According to Mr. Bauchman, Torgerson turned "every 1 ½ hour [Choir] class . . . into a prayer meeting" — not because spoken prayers were ever uttered, but because "songs are prayers set to music." TorApp 136-37. Rachel Bauchman echoed her father's views. According to Rachel, "any song that mentions deity" is "[b]y my definition a prayer." TorApp 104.

TorApp 116H. Bauchman herself confesses that Torgerson never mentioned her by name in any lecture, TorApp 83, 107, and that while she found Torgerson's statements "unprofessional" and "insulting," they did not affect her religious beliefs and were not "inappropriate" in any other way. TorApp 90-91. For his part, Torgerson made clear to the Bauchmans that Rachel — like any student — was welcome to opt out of any Choir rehearsal or performance. Bauchman understood that the choice to participate with the Choir was entirely hers, and she ultimately received an "A" grade in the Choir. TorApp 78.

Torgerson also did not, as Bauchman contends in her petition, "offer a prayer" at a 1994-95 Choir performance. Pet. 4. Bauchman refers to a year-end concert that she did not attend. Bauchman's friend, who did attend, indicated that Torgerson simply addressed parents and other audience members during a year-end speech in which he thanked his "heavenly father" for the "opportunity in working with these young people." TorApp 112; TCA 338. No one who was there adopts Bauchman's distorted view that Torgerson offered a prayer. Bauchman's friend acknowledged that the statement "was obviously part of [Torgerson's] speech" — simply an "emotional speech . . . at the end of the school year." TorApp 112-13.

Bauchman likewise misrepresents the record regarding the so-called "covert Spring trip." Pet. 4. First, despite the misleading implication in the petition, the tour never did occur and actually got no further than the rough planning stages. Second, the tour contemplated was private, not "covert." Torgerson determined that he would not direct a school-sponsored tour and submitted nothing to the school or school district seeking approval for any tour. TorApp 49. If the tour had materialized, it was to have been sponsored by a Boy Scout Explorer Post that was not affiliated with West High School. TorApp 177-78. Third, it was not "Torgerson's tour." Pet. 5. Student Bonnie Catenzaro tried to

organize the private tour; it was she who called interested students and passed out registration forms.[7] TorApp 177. Neither she nor anyone else used school-owned copiers, papers, postage meters, or any other supplies to contact potential tour participants. TorApp 179-80.

D. The District Court Denies Leave to Amend

Following the discovery period which revealed these facts, Bauchman renewed her motion for leave to amend. Curiously, she did not propose a second amended complaint that incorporated the "facts" she claimed to have gathered during discovery. Instead, Bauchman elected to "stand on the amended pleading proffered before the conduct of discovery." *Bauchman v. West High School*, 95-C-506G, 1996 WL 407856 at *1 (A82) (D. Utah May 30, 1996).[8] While Bauchman complains that the district court improperly "weighed the evidence presented," Pet. 6, it was Bauchman who tendered a host of affidavits and deposition excerpts in support of her renewed motion for leave to amend, and invited the district court to consider this "evidence" in conjunction with the proposed Amended Complaint. In fact, as the district court noted, some of Bauchman's claims were never pled in any complaint, but were argued for the first time in Bauchman's motion for leave to amend. 1996 WL 407856 at *3 (A89).

The district court denied Bauchman leave to amend. *Id.* at *11 (A109). In denying leave, the court reviewed Bauchman's

7. Bauchman claims that she and two other Jewish students were not invited on the private tour. If that is true, it is not attributable to Torgerson. As organizer of the tour, Catenzaro made up the list of students she would contact. TorApp 180-81. She never discussed with Torgerson whom she had contacted, and Torgerson assumed that "everyone who wanted to go would have an opportunity to go." TorApp 48-49.

8. Page numbers preceded by the letter "A" refer to pages in the Appendix to Bauchman's Petition for Writ of Certiorari.

allegations in detail — claim-by-claim — from the standpoint of a "reasonable observer" pursuant to the endorsement test enunciated in *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753 (1995). *Id.* at *3-*9 (A86-A105). The district court assumed well-pled allegations of fact as true and resolved disputed issues of fact in Bauchman's favor. *Id.* at *4-*6 (A90-A99). In other instances, the district court correctly declined to assume as true Bauchman's unpled arguments, where all of the evidence was contrary to her contentions. *Id.* Having applied appropriate standards of review, the district court concluded that Bauchman's proposed amendment was "futile for failure to state a claim." *Id.* at *9 (A106).

E. The Tenth Circuit Affirms the District Court

Bauchman appealed the district court's rulings, and a Tenth Circuit majority panel rejected Bauchman's appeal on a variety of grounds. 132 F.3d 542 (A1-A43). First, the panel noted that Bauchman "declined an invitation to audition" for the Choir after 1994-95 and that she graduated from high school in June 1997. *Id.* at 546 (A7). As a result, the court found, "there can be no reasonable expectation" that Bauchman will again be subjected to any alleged unconstitutional conduct at West High School. *Id.* at 548 (A11). The Tenth Circuit deemed Bauchman's claims for injunctive and declaratory relief moot and dismissed them.[9]

Having narrowed its focus to Bauchman's First Amendment claims under § 1983, the court undertook an exhaustive review of Bauchman's contentions, taking "particular care in studying Ms. Bauchman's claims and legal arguments."[10] *Id.* at 545 (A5). With

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9. The Tenth Circuit also remanded Bauchman's state law claims with instructions to the district court to dismiss the claims without prejudice for want of pendent jurisdiction. *Id.* at 549-550 (A13-A15).

10. The Tenth Circuit dismissed Bauchman's claims under the Free Exercise and Free Speech clauses because Bauchman was unable to plead the requisite (Cont'd)

respect to Bauchman's Establishment Clause claim, the Tenth Circuit reviewed this Court's recent Establishment Clause cases and recognized that *Lemon v. Kurtzman*, 403 U.S. 602 (1971), is still the "benchmark case for Establishment Clause analysis." *Id.* at 551 (A17). The court nevertheless heeded this Court's instruction that no " 'single test or criterion' " currently governs analysis under the Establishment Clause. *Id.* at 550 (A17) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 678-79 (1984)). Like the district court, the Tenth Circuit applied the purpose and effect components of the endorsement test that has developed in recent years, as well as the entanglement prong found in *Lemon*. *Id.* at 550-56 (A16-A30).

The Tenth Circuit first applied the endorsement framework to Bauchman's original Complaint, reviewing the district court's ruling de novo. The Tenth Circuit recognized its obligation to "accept all the well-pleaded facts of the complaint as true and construe them in the light most favorable to the plaintiff." *Id.* at 550 (A16) (citations omitted). Having done so, the court affirmed the district court's dismissal of Bauchman's Complaint. Citing recent Fifth Circuit authority, the Tenth Circuit observed that

> [a]ny choral curriculum designed to expose students to the full array of vocal music culture . . . can be expected to reflect a significant number of religious songs.

Id. at 554 (A25-A26) (citing *Duncanville*, 70 F.3d at 407-08). Accordingly, the court reasoned,

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(Cont'd)

"element of coercion." *Id.* at 557 (A32). Specifically, Torgerson gave Bauchman the option not to participate in Choir rehearsals and performances and assured that her grade in the Choir class would not suffer if she limited her participation. *Id.* Bauchman does not seek this Court's review of these dismissed claims.

> the selection of religious songs from a body of choral music predominated by songs with religious themes and text, and the selection of public performance venues affiliated with religious institutions, without more, amount to religiously neutral educational choices.

Id. at 556 (A29).

In dissent, Judge Murphy likewise concluded that "no reasonable person" could surmise that inclusion of religious songs in the Choir's repertoire and performances at religious venues had the effect of endorsing religion. *Id.* at 572 (A65-A66). In other words, the Tenth Circuit panel unanimously rejected the fundamental proposition underlying Bauchman's pleadings — that public school choirs may not constitutionally perform religious songs and may not perform, on occasion, at sites affiliated with religious institutions.[11] *Id.* at 553-56, 572 (A23-A30, A65-A66).

The Tenth Circuit majority affirmed the district court's denial of leave to amend. *Id.* at 562 (A42). The Tenth Circuit reviewed the denial of leave to amend for "abuse of discretion," focusing its review on the new allegation in Bauchman's proposed Amended Complaint that Torgerson was motivated by a religious purpose. *Id.* at 559-62 (A36-A42). The court deemed "disingenuous" Bauchman's argument that the district court improperly weighed evidence inasmuch as "[Bauchman] herself participated in discovery and presented supporting materials for the court's consideration." *Id.* at 562 (A42). The Tenth Circuit concluded that Bauchman's allegations do not establish that, during the 1994-95 school year,

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11. In its entanglement analysis, the Tenth Circuit relied, in part, upon *Florey v. Sioux Falls Sch. Dist.*, 619 F.2d 1311 (8th Cir.), *cert. denied*, 449 U.S. 987 (1980) — one of the very cases Bauchman holds out as conflicting with the Tenth Circuit's ruling in this case. 132 F.3d at 556 (A28).

> Torgerson actually taught or proselytized his religious beliefs, advocated Christianity in general, condemned or criticized others' beliefs, [or] conducted or permitted prayer or other religious exercises by or with Choir members.

Id. at 561 (A41) (footnote omitted). As a result, "Bauchman's allegations concerning [ ] Torgerson's past conduct provide no . . . indication of a religious purpose during the 1994-95 school year." *Id.* at 561 (A40).

The Tenth Circuit did not, as Bauchman argues, require a "contemporaneous, express admission of an unconstitutional purpose" or require a statement such as, "my purpose is to promote religion." Pet. 7, 11. Rather, having encountered no actionable conduct by Torgerson during the 1994-95 school year, the Tenth Circuit simply ruled that a purpose prong violation must be premised on *some* "objectively discernible conduct or communication that is temporally connected to the challenged activity." 132 F.3d at 560 (A38). In other words, since Bauchman stated no claim of endorsement during her own year in the Choir, the Tenth Circuit rejected her attempt to erect a purpose prong violation solely out of allegations regarding years prior to her enrollment at West High School. The Tenth Circuit found nothing in Justice O'Connor's endorsement analysis that would "condone the use of alleged past violations suffered by nonparties to bootstrap the constitutional claims of a present litigant." *Id.* at 560 (A38). Any other result, the Tenth Circuit reasoned, would: (1) involve courts in the virtually impossible task of attempting to "discern a defendant's psychological *motives vis a vis* his past conduct;" (2) lead to "protracted litigation" by a "single, 'offended' student" who could easily allege religious purposes based upon events from years past; and (3) enmesh the courts in curriculum and educational policy decisions better left to "states and locally elected school boards." *Id.* at 560-61 (A39-A40).

Having held that Bauchman's Complaint and proposed Amended Complaint failed to state a claim, the Tenth Circuit declined to review the district court's ruling that Torgerson and the school district defendants were entitled to qualified immunity. *Id.* at 550 (A15).

REASONS FOR DENYING THE WRIT

This Court's review of Bauchman's claims is unwarranted for several reasons. First, the Tenth Circuit's holding is a sound and unremarkable application of this Court's existing Establishment Clause precedent. It neither departs from this Court's case law nor offers a meaningful opportunity to break new Establishment Clause ground. Second, the "Circuit split" asserted by Bauchman is manufactured, not real. The Tenth Circuit's ruling in this case is readily distinguishable from three of the four rulings Bauchman holds out as conflicting. The fourth ruling, the Eighth Circuit's *Florey* decision, affirmatively supports the Tenth Circuit's ruling and was relied upon by the Tenth Circuit in reaching its decision. Third, the Tenth Circuit recited and properly applied long-recognized pleading standards in affirming the district court's rulings. It imposed no new or improper obstacles to pleading Establishment Clause cases. Fourth, even if there were grounds for this Court's review, Torgerson and the other defendants are entitled to qualified immunity — a separate ground for dismissal of Bauchman's § 1983 claims that obviates any need for detailed review on the merits.

I.

The Tenth Circuit's Ruling is Premised Upon a Sound Application of Existing Establishment Clause Precedent

The Tenth Circuit correctly applied this Court's precedent regarding Establishment Clause purpose analysis. The Tenth Circuit noted that, while "a failure to satisfy the purpose

component of the endorsement test alone" is enough to invalidate government action, this "Court rarely has decided cases based solely on [*Lemon*'s] purpose component." *Id.* at 552 (A19-A20) (citing *Edwards v. Aguillard*, 482 U.S. 578, 585 (1987) and *Wallace v. Jaffree*, 472 U.S. 71, 75 (1985) (O'Connor, J., concurring)). When the Court has invalidated government action under a purpose analysis, "the overriding religious purpose of the government action has been obvious, leaving little need to elaborate on the appropriate scope of the purpose inquiry." *Id.* (A20) (citations omitted). The Tenth Circuit applied both the purpose and effect components of the endorsement test to Bauchman's claims. *Id.* (A20-21).

Bauchman misreads the Tenth Circuit's decision and then conjures up a "parade of horribles" that will flow from it. In the end, however, Bauchman cannot escape her own critical admissions that shaped the Tenth Circuit's analysis. Unlike the prototypical Establishment Clause plaintiff, Bauchman sought relief under the endorsement test's purpose component when she herself had not been subjected to any conduct that had the effect of endorsing religion. *See* 132 F.3d at 561 (A41). During *her year* in the Choir, Torgerson never had the Choir perform during a religious service; never prayed in front of the Choir; never talked to the Choir about religious doctrines or beliefs; and never criticized the beliefs of any religion, atheism, or agnosticism. Like any other school choir member, she was given both religious and secular songs to rehearse and perform, and she was asked to perform them, on occasion, at sites owned by religious organizations. No court that has considered these issues has found any constitutional violation. *See, e.g.*, 132 F.3d at 553-56 (A23-A29); *Duncanville*, 70 F.3d at 407-08.

Bauchman also reads far too much into the Tenth Circuit's ruling. The court did not, as Bauchman contends, "nullify purpose analysis entirely by imposing unprecedented obstacles" or bar

"all indirect evidence of intent and motive." Pet. 11. To the contrary, the Tenth Circuit's ruling contemplates that purpose component claims may be supported by "concrete manifestations of intent" — that is, allegations of conduct or statements that are "temporally connected to the challenged activity."[12] 132 F.3d at 560-61 (A39-40). If, during 1994-95, Torgerson had touted his own religion, lectured about Mormon doctrine, or suggested that his students subscribe to Christianity generally, such conduct would have manifested a purpose to endorse religion. The absence of any such allegation regarding Bauchman's year in the Choir brings into striking relief the fact that Bauchman was not exposed to any manifestation of religious purpose.

Moreover, contrary to the argument in Bauchman's supplemental brief, the Tenth Circuit's ruling is not at odds with this Court's recent opinion in *Crawford-El v. Britton*, No. 96-827, 1998 WL 213193 (U.S. May 4, 1998). In *Crawford-El*, the Court invalidated the D.C. Circuit's adoption of a "clear and convincing evidence" standard of proof for unconstitutional motive cases. *Id.* at *11-*15. The Tenth Circuit, on the other hand, made no effort to alter the burden of proof in Establishment Clause cases. The court merely applied ordinary pleading standards — not evidentiary burdens of proof — in rejecting Bauchman's allegations. 132 F.3d at 550 (A15-16). The Tenth Circuit indicated only that it was unwilling to try to read Torgerson's mind during the 1994-95 school year, thereby inferring

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12. Nor did the Tenth Circuit engage, as Bauchman argues, in a "plain misreading" of *Board of Education v. Mergens*, 496 U.S. 226 (1990). The majority panel did not mistake *Mergens* as being about something other than the interpretation of legislative purpose. The majority simply cites *Mergens* in passing for the proposition that, under Establishment Clause analysis, "actual" religious purpose may be distinguished from "possible religious motives." 132 F.3d at 560 (A39). In the context of this case, the Tenth Circuit did not confuse Torgerson's supposed religious motives based on allegations dating back twenty years with the fact that Torgerson manifested no religious purpose during Bauchman's year in the Choir.

unconstitutional purposes solely from allegations that predated Bauchman's participation in the Choir by two decades. This Court, after all, has counseled reluctance in attributing unconstitutional purposes to government conduct. *See, e.g., Mueller v. Allen*, 463 U.S. 388, 394 (1983). The Tenth Circuit thus properly refused to "psychoanalyze" Torgerson or divine his "unexpressed or psychological motive" based on events from years before. 132 F.3d at 561 (A40). Indeed, the Tenth Circuit required nothing more of Bauchman than *Crawford-El* suggests: " '*specific*, *nonconclusory* allegations' " that demonstrate Torgerson's purported religious purposes during Bauchman's year in the Choir. 1998 WL 213193 at *14 (quoting *Siegert v. Gilley*, 500 U.S. 226, 236 (1991)). In light of what Bauchman admits did *not* occur during 1994-95, it is neither surprising nor inconsistent with *Crawford-El* that the Tenth Circuit found no actionable allegations of purpose in Bauchman's pleadings.

II.

There is No Conflict Among the Circuits

Bauchman goes to considerable lengths to manufacture a split among the courts of appeals. She finds a conflict where none exists. In fact, the rulings in *Black Horse*, *Ingebretsen*, *Jager*, and *Florey* are either readily distinguishable from — or supportive of — the Tenth Circuit's ruling in this case. Bauchman ignores several obvious distinctions.

First, only one of the cases Bauchman cites treated the performance of religious music in public schools, and that case is clearly consistent with the Tenth Circuit's decision in this case. *See Florey*, 619 F.2d at 1317 n.5 (recognizing the centuries-old tradition of singing Christmas carols and holding that "carols have achieved a cultural significance that justifies their being sung in the public schools. . . ."). The Tenth Circuit relied upon *Florey*

in reaching its holding regarding the Choir's curriculum.[13] 132 F.3d at 554, 556 (A24, A28). The other three cases Bauchman cites are school prayer cases, inapposite factually to this case. *See American Civil Liberties Union v. Black Horse Pike Regional Bd. of Educ.*, 84 F.3d 1471 (3d Cir. 1996) (*en banc*) (invalidating a school board policy providing for student vote on the question of prayer at high school graduation); *Ingebretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d 274 (5th Cir. 1996) (striking down a state statute permitting student-initiate prayer); *Jager v. Douglas Co. Sch. Dist.*, 862 F.2d 824 (11th Cir. 1989) (invalidating practice of allowing pregame invocations at school football games). In each of these cases, the school district actually sought to sponsor prayer during the complaining party's year at the school. Here, of course, Bauchman admits that Torgerson did not pray with the Choir, talk about religion, or criticize religious beliefs during 1994-95.

Second, while Bauchman urges a radical distinction between cases involving "the inapposite legislative context" and those invoiving a "flesh-and-blood government actor," Pet. 13, the cases Bauchman cites do not satisfy her own distinction. All four cases examined a state statute or school board policy or practice. As a result, all four courts focused on the objectively discernible purpose of the statute or policy, and none of the courts engaged in anything resembling the approach Bauchman urges — an exhaustive, psychoanalytic inquiry into a single government actor's alleged conduct and unexpressed motives dating back twenty years. *See Black Horse Pike*, 84 F.3d at 1484-85; *Ingebretsen*, 88 F.3d at 279; *Jager*, 862 F.2d at 829-30; *Florey*, 619 F.2d at 1314-15. Moreover, nothing in these cases indicates that the Third, Fifth, Eighth, or Eleventh Circuits would be any more inclined

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13. Bauchman also suggests a split between the Fifth and Tenth Circuits. Yet the Tenth Circuit cited prominently the Fifth Circuit's recent pronouncement regarding religious music in public high schools. 132 F.3d at 554 (A25); *see Duncanville*, 70 F.3d at 408 n.8 ("[P]articularly in the world of choral music, singing about religion is not the same as endorsing or exercising religion.").

than the Tenth Circuit to attribute unconstitutional purposes to a school teacher when the complaining student concedes that the teacher did nothing to endorse religion during the student's year in the classroom.

Third, Bauchman argues that her claims are viable solely on the basis of a purpose component analysis. Yet none of the cases from the Third, Fifth, and Eleventh Circuits struck down the school prayer statute or policy solely on the basis of the purpose component.[14] *See Black Horse Pike*, 84 F.3d at 1484-88 (school board policy violates purpose *and* effect components; declining to reach entanglement prong); *Ingebretsen*, 88 F.3d at 279 (statute violates purpose, effect, *and* entanglement prongs); *Jager*, 862 F.2d at 829-30 (school policy violates purpose *and* effect components). There is no conflict among the courts of appeals.

III.

The Tenth Circuit Properly Applied Ordinary Pleading Standards

The Tenth Circuit followed this Court's well-settled rules regarding pleadings. *See Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). The Tenth Circuit recognized that it "must accept all the well-pleaded facts of the complaint as true and must construe them in the light most favorable to the plaintiff." 132 F.3d at 550 (A16). The Tenth Circuit measured Bauchman's proposed Amended Complaint against this same standard, recognizing that a motion for leave to amend a complaint should be denied if the proposed amendment is futile. *Id.* at 559 (A36) (citing *Foman v. Davis*, 321 U.S. 178, 182 (1962)).

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14. Of course, *Florey* — the only case dealing with religious music in public schools — upheld the school district policy as measured against all three prongs. 619 F.2d at 1314-18.

The Tenth Circuit did not, as Bauchman contends, improperly incorporate the district court's "inappropriate weighing of the evidence and rejection of allegations." Pet. 17. The district court fairly construed both Bauchman's allegations and the evidentiary record Bauchman submitted. With respect to well-pleaded allegations of fact, the district court assumed them as true and resolved disputed issues of fact in Bauchman's favor. *See* 1996 WL 407856 at *4-*6 (A90-A99); 900 F. Supp. at 259-61. In a few instances, after the parties had conducted discovery, the district court correctly declined to assume as true Bauchman's unpled arguments, where *all* of the evidence was contrary to her contentions.[15] Bauchman chose, after all, not to propose a second amended pleading after conducting discovery, but to submit evidence for the district court's consideration. 132 F.3d at 562 (A42). Once Bauchman submitted her evidence, she surely could not expect the court to accept as true those allegations as to which all of the evidence was contrary. Both the district court and Tenth Circuit applied appropriate pleading standards in ruling upon Bauchman's allegations.

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15. For example, the district court rejected Bauchman's contention that Torgerson allowed a 1994 concert "to be opened with a prayer" because there was no evidence that it happened, and there was direct, eyewitness testimony that it did not. 1996 WL 407856 at *5 (A94-A95); TorApp i 16A-116J. The district court also was unwilling to assume as true Bauchman's conclusory allegation that Torgerson lectured about "the centrality of religion in his teaching" when Bauchman herself admitted that Torgerson never once spoke to the Choir about any religious doctrine, much less his own religion. *Id.* at *7-*8 (A100-A102).

IV.

Torgerson and the Other Defendants are Entitled to Qualified Immunity — An Independent Ground for the Dismissal of Bauchman's Claims

In dismissing Bauchman's Complaint, the district court correctly observed that Torgerson is entitled to qualified immunity " 'insofar as his conduct *does not violate clearly established statutory or constitutional rights* of which a reasonable person would have known.' " 900 F. Supp. at 265 (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1981)) (emphasis added). The Tenth Circuit ruled on the merits of Bauchman's pleadings, deeming it unnecessary to reach the district court's qualified immunity ruling. 132 F.3d at 550 (A15). However, the Tenth Circuit dismissed Bauchman's injunctive and declaratory relief claims for mootness, leaving only her § 1983 claims for review. *Id.* at 548-49 (A11-A12). As a result, even if this Court were inclined to review the merits of Bauchman's remaining claims under § 1983, Torgerson's qualified immunity defense would render the claims subject to dismissal.

Since Torgerson has raised the qualified immunity defense, Bauchman must state factual allegations necessary to sustain a conclusion that Torgerson's "conduct violated clearly established law." *Crawford-El*, 1998 WL 213193 at *14. In the Tenth Circuit, for federal constitutional law to be "clearly established," "there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as [Bauchman] maintains." *Medina v. City and County of Denver*, 960 F.2d 1493, 1498 (10th Cir. 1992).

Bauchman cites no case to "demonstrate that First Amendment law concerning school curriculum or religious music was clearly established during the 1994-95 school year." 900 F. Supp. at 265. Indeed, the virtually unanimous authority from other

jurisdictions was — and continues to be — to the effect that Torgerson's actions during 1994-95 were constitutionally sound. *See, e.g., Duncanville*, 70 F.3d at 404-08 (upholding against an Establishment Clause challenge a high school choir's adoption of the "The Lord Bless You and Keep You" as the choir's theme song); *Florey*, 619 F.2d at 1317 n.5 (noting the "cultural significance" of Christmas carols and holding that they may be sung in public schools); *Chaudhuri v. Tennessee*, 886 F. Supp. 1374, 1388 (M.D. Tenn. 1995) (upholding against an Establishment Clause challenge the singing of religious songs at college graduation); *cf. Society of Separationists, Inc. v. Whitehead*, 870 P.2d 916, 932 (Utah 1993) ("[W]hen sung apart from a formalized worship service, on or off church property, [Christmas] carols are simply artistic expression of a predominantly Christian culture. The same is true of any number of other artistic expressions that have occupied center stage in Western European civilization for more than 1500 years.") Bauchman's § 1983 claims are subject to dismissal based on Torgerson's qualified immunity.

CONCLUSION

For the foregoing reasons, Torgerson respectfully submits that Bauchman's petition should be denied.

Respectfully submitted,

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